

## **REMARKS**

This is a full and timely response to the outstanding non-final Office Action mailed July 28, 2006 (Paper No. 20060721). Upon entry of this response, claims 1-8, 10-18, and 20-46 are pending in the application. In this response, claims 1, 11, 20, and 29 have been amended. Applicant respectfully requests that the amendments being filed herewith be entered and request that there be reconsideration of all pending claims.

### **1. Official Notice**

The outstanding Office Action alleges that:

Applicant's failure to properly traverse the Official Notice taken as admission of prior art. In particular applicant must specifically point out the supposed errors in the Examiner's action, which would include stating why the noticed fact is not considered to be common knowledge or well known in the art. See 37 CFR 1.111(b). Applicant simply makes a broad statement without referring to specific claims or the specific features of which Official Notice was taken.  
(Office Action, p. 2.)

The MPEP explains the procedure for traversing an allegation of Official Notice:

To adequately traverse such a finding, an applicant must specifically point out the supposed errors in the examiner's action, which would include stating why the noticed fact is not considered to be commonly known or well known in the art. See 37 C.F.R. 1.111(b). See also *Chevenard*, 139 F.2d at 713, 60 USPQ at 241. ("[I]n the absence of any demand by applicant for the examiner to produce authority for his statement, we will not consider this contention.") A general allegation that the claims define a patentable invention without any reference to the examiner's assertion of Official notice would be inadequate.  
MPEP 2144.03(C)

Applicant respectfully submits that the traversal of Official Notice contained in the last response (and reproduced below) meets the requirements of MPEP 2144.03(C):

Furthermore, any and all findings of well-known art and official notice, or statements interpreted similarly, should not be considered well known since the Office Action does not include specific factual findings predicated on sound technical and scientific reasoning to support such conclusions.  
(p. 17 of Response filed July 25, 2005)

Specifically, Applicant points out that

- a) the traversal was not a “general allegation that the claims define a patentable invention”;
- b) the traversal did reference the assertion of Official notice; and
- c) the traversal did state why the noticed fact is not considered to be commonly known or well known in the art (“should not be considered well known since the Office Action does not include specific factual findings predicated on sound technical and scientific reasoning to support such conclusions”).

Applicant notes that the reasons given in the outstanding Office Action for why the traversal was inadequate – “Applicant simply makes a broad statement without referring to specific claims or the specific features of which Official Notice was taken” – are not found in the MPEP. For at least these reasons, Applicant has **not** made any admissions of prior art, as alleged in the outstanding Office Action.

In addition, Applicant further contends that the subject matter of each particular finding of Official Notice should not be considered to be well-known for the specific reasons that the statements are too complex and detailed to be considered well-known. Specifically, Applicant traverses the finding of Official Notice in connection with claims 3-4, 10, 13-14, 22-23, and 30 that “transmitting a price in response to a user request is well known in the art.” Applicant traverses the finding of Official Notice in connection with claims 6, 16, 28, and 43 that “random access options, such as trick play modes, used in conjunction with VOD are well known in the art.” Applicant traverses the finding of Official Notice in connection with claims 7, 17, 26, and 44 that “charging different prices to customers based on customer priority is notoriously well known in the art.” Applicant traverses the finding of Official Notice in connection with claim 32

that “displaying an indicator for utilizing a viewing option is well known in the art.” Applicant traverses the finding of Official Notice in connection with claims 33 and 34 that “displaying an elapsed time, for example an indicator, which notes that the program started 5 minutes ago, and an indicator displayed intermittently, such as a trick play indicator, is well known in the art.” Applicant traverses the finding of Official Notice in connection with claims 35, 37, 39, and 40 that “playing a trick play indicator is well known in the art.” Finally, Applicant traverses the finding of Official Notice in connection with claim 38 that “the use of a user selectable icon within an electronic program guide to bring up a menu of options is notoriously well known in the art.”

## 2. Rejection of Claims 1-7 and 10-17 under 35 U.S.C. §103

Claims 1-7 and 10-17 have been rejected under §103(a) as allegedly obvious over *Shah-Nazaroff et al.* (6,157,377) in view of *Gell et al.* (5,802,502) and *Blahut et al.* (5,532,735). Applicant respectfully traverses this rejection. It is well established at law that, for a proper rejection of a claim under 35 U.S.C. §103 as being obvious based upon a combination of references, the cited combination of references must disclose, teach, or suggest, either implicitly, all features of the claim at issue. *See, e.g., In re Dow Chemical*, 5 U.S.P.Q.2d 1529, 1531 (Fed. Cir. 1988); *In re Keller*, 208 U.S.P.Q.2d 871, 881 (C.C.P.A. 1981).

### a. Claims 1 and 11

- i) The proposed combination does not disclose, teach, or suggest “receiving bandwidth allocation schedule information describing a division of bandwidth during a plurality of time periods”

The Office Action alleges that *Gell et al.* teaches the above feature at Col. 4, line 34 to Col. 5, line 7. (Office Action, p. 2, paras. 2-3.) More specifically, the Office Action (at p. 4, para. 1) alleges that this feature corresponds to this teaching in *Gell et al.*:

Referring to FIG. 5a, at predetermined intervals, the selection device processor 14 of each network 1a-1c is arranged to assess its demand for long range calls in a step 100 (for example by examining the current number of such calls in progress, and/or by using stored average data indicating the typical demand for long distance telecommunications at the relevant time of day, possibly including consideration of the day type--holiday, working day, weekend etc.).

(*Gell et al.*, Col. 4, lines 35-45)

Applicant respectfully disagrees for the following reasons. *Gell et al.* describes periodically assessing demand for calls using current or historical demand data. Applicant first submits that information indicating demand for calls is not “information describing a division of bandwidth” as recited in claims 1 and 11. Since *Gell et al.* does not describe “demand for calls” in any further detail, the cited passages teaches no more than a number of calls expected during a specific time period. Even assuming, *arguendo*, that a total amount of bandwidth can be computed from a number of calls, this total bandwidth is not equivalent to “information describing a **division** of bandwidth during a plurality of time periods, the division of bandwidth being between at least a first service and a second service” as recited in claims 1 and 11.

The Office Action admits that *Shah-Nazaroff et al.* does not disclose the above-described feature. *Blahut et al.* also fails to teach, suggest, or disclose the above-described feature. Accordingly, the proposed combination of *Shah-Nazaroff et al.*, *Gell et al.*, and *Blahut et al.* does not teach at least the above-described feature. Since the proposed combination does not teach at least the above-described features recited in claims 1 and 11, a *prima facie* case establishing an obviousness rejection has not been made. Thus, claims 1 and 11 are not obvious under the proposed combination of *Shah-Nazaroff et al.*, *Gell et al.*, and *Blahut et al.*, and the rejection should be withdrawn.

ii) The proposed combination does not disclose, teach, or suggest “receiving bandwidth allocation schedule information describing a division of bandwidth...between at least a first service and a second service provided by the digital broadband delivery system to a plurality of digital home communication terminals”

Neither *Shah-Nazaroff et al.* nor *Gell et al.* describe services “provided by the digital broadband delivery system to a plurality of digital home communication terminals”. *Blahut et al.* discloses an interactive TV system which delivers video-on-demand services using satellites. Applicant admits that a satellite delivery system does divide bandwidth among services. However, the mere fact that *Blahut et al.* discloses a particular delivery system which divides bandwidth is not a teaching of “**information describing** a division of bandwidth between at least a first service and a second service” as recited in claims 1 and 11. As discussed above, the “information” disclosed in *Gell et al.* is information indicating demand for calls. There is no connection between the call demand information in *Gell et al.* and the type of delivery system used in *Gell et al.* (a telephone network). Thus, even if the pricing system using call demand information in *Gell et al.* is modified to include the a satellite delivery system from *Blahut et al.*, the resulting combination does not disclose, teach, or suggest “information describing a division of bandwidth between at least a first service and a second service” as recited in claims 1 and 11.

iii) The proposed combination does not disclose, teach, or suggest “dynamically assigning a price criterion...based at least in part on the bandwidth allocation schedule information”

The Office Action (p. 4, para. 1) alleges that *Gell et al.* discloses “prices are generated dynamically, by receiving pricing from a number of different program providers (column 12, lines 49-60, column 13, lines 3-11, lowest price is selected based on QOS and quality selections, bandwidth allocation is the QOS settings.” Applicant will assume, *arguendo*, that QOS is related to bandwidth, so that assigning a price to a service delivered to a customer based on the QoS

associated with that service would correspond to assigning a price based on bandwidth used by that service.

However, claims 1 and 11 do not recite assigning a price to a service based on bandwidth used by that service. Instead, claims 1 and 11 recite the feature of “dynamically assigning a price criterion...based at least in part on the bandwidth allocation schedule information”, where “bandwidth allocation schedule information” is further described in claims 1 and 11 as “describing a **division of bandwidth** during a plurality of time periods, the division of bandwidth being between at least a first service and a second service”. As explained above, none of the cited references discloses “information describing a division of bandwidth”. Thus, the combination of *Gell et al.* with the other references does not disclose, teach, or suggest “dynamically assigning a price criterion” based on “information describing a division of bandwidth” between services as recited in claims 1 and 11.

b. Claims 2-7, 10, and 12-17

Since claims 1-7 and 10-17 are allowable, Applicant respectfully submits that claims 2-7, 10, and 12-17 are allowable for at least the reason that each depends from an allowable claim. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q. 2d 1596, 1598 (Fed. Cir. 1988). Therefore, Applicant respectfully requests that the rejection of claims 2-7, 10, and 12-17 be withdrawn.

3. Rejection of Claims 20-26 and 28-44 under 35 U.S.C. §103

Claims 20-26 and 28-44 have been rejected under §103(a) as allegedly obvious over *Shah-Nazaroff et al.* (6,157,377) in view of *Gell et al.* (5,802,502), *Blahut et al.* (5,532,735), and *Son et al.* (6,697,376). Applicant respectfully submits that the rejection has been overcome by claim amendments made herein. It is well established at law that, for a proper rejection of a claim under 35 U.S.C. §103 as being obvious based upon a combination of references, the cited

combination of references must disclose, teach, or suggest, either implicitly, all elements/features/steps of the claim at issue. *See, e.g., In re Dow Chemical*, 5 U.S.P.Q.2d 1529, 1531 (Fed. Cir. 1988); *In re Keller*, 208 U.S.P.Q.2d 871, 881 (C.C.P.A. 1981).

a. Claims 20 and 28

Claims 20 and 28 have been amended to recite “a pricing system that receives bandwidth allocation information, from the bandwidth allocation manager, describing the division of bandwidth between the content delivery modes, and that dynamically assigns a price criterion to each of a group of viewing options based at least in part on the bandwidth allocation information received from the bandwidth allocation manager”.

The Office Action (p. 9, para. 3) alleges that *Gell et al.* discloses “prices are generated dynamically, by receiving pricing from a number of different program providers (column 12, lines 49-60, column 13, lines 3-11, lowest price is selected based on QOS and quality selections, bandwidth allocation is the QOS settings.” Applicant will assume, *arguendo*, that QOS is related to bandwidth, so that assigning a price to a service delivered to a customer based on the QoS associated with that service would correspond to assigning a price based on bandwidth used by that service.

However, amended claims 20 and 28 do not recite a pricing system that assigns a price to a service based on bandwidth used by that service. Instead, claims 20 and 28 recite the feature of “a pricing system that receives bandwidth allocation information...describing the division of bandwidth between the content delivery modes, and that dynamically assigns a price criterion...based at least in part on the bandwidth allocation information”.

None of the cited references discloses information “describing the division of bandwidth” between content delivery modes. *Gell et al.* describes periodically assessing demand for calls

using current or historical demand data. Applicant first submits that information indicating demand for calls is not “information describing the division of bandwidth” as recited in claims 20 and 28. Since *Gell et al.* does not describe “demand for calls” in any further detail, the cited passages teaches no more than a number of calls expected during a specific time period. Even assuming, *arguendo*, that a total amount of bandwidth can be computed from a number of calls, this total bandwidth is not equivalent to “information describing a **division** of bandwidth” as recited in claims 20 and 28.

Neither *Shah-Nazaroff et al.*, *Blahut et al.*, nor *Son et al.* discloses information “describing the division of bandwidth” between the content delivery modes. Since none of the cited references discloses “information describing the division of bandwidth”, the combination of *Gell et al.* with the other references does not disclose, teach, or suggest “a pricing system that dynamically assigns a price criterion” based on “information describing the division of bandwidth” between content delivery modes. Since the proposed combination does not teach at least the above-described features recited in claims 20 and 28, a *prima facie* case establishing an obviousness rejection has not been made. Thus, claims 20 and 28 are not obvious under the proposed combination of *Shah-Nazaroff et al.* in view of *Gell et al.*, and the rejection should be withdrawn.

b. Claims 21-26 and 29-44

Since independent claims 20 and 28 are allowable, Applicant respectfully submits that dependent claims 21-26 and 29-44 are allowable for at least the reason that each depends from an allowable claim. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q. 2d 1596, 1598 (Fed. Cir. 1988). Therefore, Applicant respectfully requests that the rejection of claims 21-26 and 29-44 be withdrawn.

**4. Rejection of Claims 8 and 18 under 35 U.S.C. §103**

Claims 8 and 18 have been rejected under §103(a) as allegedly obvious over *Shah-Nazaroff et al.* (6,157,377) in view of *Gell et al.*, *Blahut et al.* (5,532,735) and *Candelore et al.* (6,057,872). Applicant respectfully traverses this rejection. *Candelore et al.* does not make up for the deficiencies of *Shah-Nazaroff et al.*, *Gell et al.*, and *Blahut et al.* described above. Therefore, claims 8 and 18 are considered patentable under any combination of these references. Furthermore, since independent claims 1 and 11 are allowable, Applicant respectfully submits that dependent claims 8 and 18 are allowable for at least the reason that each depends from an allowable claim. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q. 2d 1596, 1598 (Fed. Cir. 1988). Therefore, Applicant respectfully requests that the rejection of claims 8 and 18 be withdrawn.

**5. Rejection of Claim 27 under 35 U.S.C. §103**

Claim 27 has been rejected under §103(a) as allegedly obvious over *Shah-Nazaroff et al.* (6,157,377) in view of *Gell et al.* (5,802,502), *Blahut et al.* (5,532,735), *Son et al.* (6,697,376), and *Candelore et al.* (6,057,872). Applicant respectfully traverses this rejection. *Son et al.* does not make up for the deficiencies of *Shah-Nazaroff et al.*, *Gell et al.*, *Blahut et al.*, and *Candelore et al.* described above. Therefore, claim 27 is considered patentable under any combination of these references. Furthermore, since independent claim 20 is allowable, Applicant respectfully submits that dependent claim 27 is allowable for at least the reason that it depends from an allowable claim. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q. 2d 1596, 1598 (Fed. Cir. 1988). Therefore, Applicant respectfully requests that the rejection of claim 27 be withdrawn.

**6. Rejection of Claims 45-46 under 35 U.S.C. §103**

Claims 45-46 have been rejected under §103(a) as allegedly obvious over *Shah-Nazaroff et al.* (6,157,377) in view of *Gell et al.* (5,802,502), *Blahut et al.* (5,532,735), *Son et al.*

(6,697,376), and *Arsenault et al.* (6,701,528). Applicant respectfully traverses this rejection. *Arsenault et al.* does not make up for the deficiencies of *Shah-Nazaroff et al.*, *Gell et al.*, *Blahut et al.*, and *Son et al.* described above. Therefore, claims 45-46 are considered patentable under any combination of these references. Furthermore, since independent claim 29 is allowable, Applicant respectfully submits that dependent claims 45-46 are allowable for at least the reason that each depends from an allowable claim. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q. 2d 1596, 1598 (Fed. Cir. 1988). Therefore, Applicant respectfully requests that the rejection of claims 45-46 be withdrawn.

**CONCLUSION**

Applicant respectfully requests that all outstanding objections and rejections be withdrawn and that this application and presently pending claims 1-8, 10-18, and 20-46 be allowed to issue. Any statements in the Office Action that are not explicitly addressed herein are not intended to be admitted. In addition, any and all findings of inherency are traversed as not having been shown to be necessarily present. Furthermore, any and all findings of well-known art and official notice, or statements interpreted similarly, should not be considered well known since the Office Action does not include specific factual findings predicated on sound technical and scientific reasoning to support such conclusions. If the Examiner has any questions or comments regarding Applicant's response, the Examiner is encouraged to telephone Applicant's undersigned counsel.

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